

Amendment to Resolution No. 7 - 2005

**BY: Chairperson at the request
of the County Executive**

**Legislative Day No. 3
Date: February 7, 2005**

Amendment No. 2

(This amendment substitutes the Road, Water, and Sewer Developer Agreement entered into between the County and Edy's Grand Ice Cream. The new Agreement:

- 1. Inserts the property description;*
- 2. Corrects the construction cost for the water and sewerage improvements; and*
- 3. Corrects the corporate name of Edy's Grand Ice Cream.)*

- 1 Remove Exhibit B, which is attached to the Resolution as introduced, and substitute
- 2 Exhibit B attached to this Amendment.

**ROAD, WATER, AND SEWER
DEVELOPER AGREEMENT
HOWARD COUNTY, MARYLAND**

THIS ROAD, WATER, AND SEWER DEVELOPER AGREEMENT ("Agreement") is made this _____ day of _____, 2005, by and between **EDY'S GRAND ICE CREAM , an indirect wholly-owned subsidiary of Dreyer's Grand Ice Cream Holdings, Inc.**, a California corporation licensed to conduct business in the state of Maryland (the "Developer") and **HOWARD COUNTY, MARYLAND**, a body corporate and politic (the "County").

WHEREAS, the Developer is the fee simple owners of certain real property located in the First Election District of Howard County, Maryland at 9090 Whiskey Bottom Road, Laurel, Maryland identified on (i) Tax Map 50, Parcels 271 and 341 pursuant to the deed recorded among the Land Records of Howard County, Maryland, at Liber 8864, Folio 452 *et seq.* described as 11.948 acres and 18.036 acres, respectively; (ii) Tax Map 50, Parcel 259 pursuant to the deed recorded among the Land Records of Howard County, Maryland, at Liber 8708, Folio 469 *et seq.* described as .71 acres; (iii) Tax Map 50, Parcels 302, 509, 420, and 293 pursuant to the deed recorded among the Land Records of Howard County, Maryland, at Liber 8864, Folio 476 *et seq.* described as 9.16 acres, 7.1341 acres, .9453 acres and .6774 acres, respectively (all together referred to herein as the "Property") and shown on the site development plan SDP-05-40 entitled "Dreyer's Grand Ice Cream" (the "SDP") and the subdivision entitled "Property of Edy's Grand Ice Cream" (F-05-107) (the "Subdivision Plat").

WHEREAS, the Developer has submitted the SDP to the County for the expansion of an existing ice cream manufacturing facility to a building containing 570,000 square feet more or less.

WHEREAS, in order to meet public safety standards, the water capacity and water pressure in the lines serving the Property must be increased and the capacity of the sewer lines must be increased for the proposed use as shown on the SDP.

WHEREAS, the Director of the Department of Public Works has determined the most cost effective way to improve the water and sewerage systems serving the Property is to complete the required improvements through a combination of public and private improvements.

WHEREAS, the County shall complete public improvement to increase the available water supply in the 400 water zone with improvements to existing pumping stations, pressure reducing valves, and water mains under capital project W-8270 and to increase the storage capacity of the Guilford Elevated Water Tank serving the Property under capital project W-8262.

WHEREAS, certain public road improvements are required to be constructed within the public rights-of-way for Whiskey Bottom Road and US Route 1 in association with the Developer's development of the Property as shown on the SDP.

WHEREAS, the Director of the Department of Public Works has determined the most cost effective and efficient way to complete the required public road improvements is for the Developer to complete the public road improvements.

WHEREAS, the Developer has agreed to complete the construction of the remainder of the required improvements to the water and sewerage systems and the public road improvements and the County has agreed to share in the costs of such improvements as set forth herein.

WHEREAS, the County Council of Howard County, Maryland adopted Resolution Number 7-2005

authorizing the County to waive the formal competitive bidding requirements for the construction of the public road improvements and to enter into this Agreement for the cost sharing by the County for the construction of the road, water, and sewer improvements.

NOW, THEREFORE, in consideration of the covenants and agreements, hereinafter expressed, the parties hereto agree as follows:

1. Public Road Project. The Developer's engineer, The Dennis Group, LLC has prepared cost estimates for the construction of road improvements within the County and State owned rights-of-way associated with the SDP 05-40. The required road improvements within the public rights-of-way are: (i) the construction of acceleration and deceleration lanes on Whiskey Bottom Road, including paving, installing curb and gutter, restriping the lanes of the road, and mulching and seeding the unpaved areas; (ii) the construction of acceleration and deceleration lanes on US Route 1, including paving, installing curb and gutter and restriping the lanes of the road; and (iii) the construction of revitalization improvements for US Route 1 including landscaping and constructing a sidewalk (the "Public Improvements").

1.1 The County and the Developer agree that \$183,458 is the cost of the Public Improvements within the public rights-of-way for Whiskey Bottom Road and US Route 1. The County agrees to fund up to \$183,458 for the construction of the Public Improvements.

1.2 The Developer shall select the contractor for the construction of the Public Improvements. The County shall have the right to review and approve the proposals received by the Developer. The Developer shall enter into the County's Standard Developer's Agreement for Road Improvements with the County for the construction of the Public Improvements and post the required surety under the Developer's Agreement.

1.3 The Developer shall submit monthly progress reports with its invoice for work related to the portion of the Public Improvements completed each month. The County shall have the right to inspect and verify the satisfactory completion of the work reported on each report. The County shall reimburse the Developer for the cost of the satisfactory work completed on each invoice up to a total of \$183,458 for the Public Improvements.

2. Water and Sewer Project. The improvement to be constructed on the Property by the Developer pursuant to this Section 2 of the Agreement are known as the "Water and Sewer Project" and described in general terms in this Section 2. The Developer's compliance with Section 18.122A of the Howard County Code is not a part of the Agreement and the County and the Developer shall enter into a separate contract addressing the Developer's obligation, if any, for wastewater pre-treatment requirements. All of the construction shall be in accordance with the plans and specifications prepared by the Developer and approved by the County. In order to provide the necessary water and sewer service to the Property, the Developer has agreed to construct, at its expense, the following: (i) the public and private water lines and the public and private sewer lines as shown on the SDP and the water and sewer contract number 24-4246-D; and (ii) the red line revisions to water and sewer contract number 242-S, all in accordance with the construction plans and specifications approved by the County. The water and sewer lines that are located within easements or lands owned by Howard County, Maryland are known herein as the "Water and Sewer Public Improvements."

3. Water and Sewer Project Design. Developer has retained, at Developer's expense, the services of Robert H. Vogel Engineering, Inc. and The Dennis Group, LLC (the "Developer's Engineers"). Developer shall cause the Developer's Engineers to prepare, in accordance with the Howard County Code and the Howard County Design Manual, the design of the Water and Sewer Project and construction drawings and specifications, which shall be submitted to the County for its approval.

Developer shall require the Developer's Engineers to be responsible for shop drawing review and coordination, attendance at progress and start-up meetings, responses to the County's requests for interpretation of the design of the Water and Sewer Project, and the Water and Sewer Project's construction stake out. The County shall review the design of the Water and Sewer Project and the construction drawings and specifications and the Developer shall cause the Developer's Engineers to make any required changes to the design of the Water and Sewer Project and the construction drawings and specifications necessary for the County's approval. The County's approval shall be indicated on the construction drawing and specifications, (the "Approved Plans and Specifications," which defined term includes approved red line revisions). The Developer shall require the Developer's Engineers to provide the County with as-built drawings upon the completion of the Water and Sewer Project and certify the location of the Water and Sewer Project under Section 9.1.4. The original of the Approved Plans and Specifications shall be kept on file by the County.

4. Water and Sewer Project Construction.

4.1. Developer, at its expense, shall construct the Water and Sewer Project in accordance with the Approved Plans and Specifications. Developer shall provide all labor, materials and equipment necessary to complete the construction of the Water and Sewer Project in a timely manner, but in any event within two (2) years from the date of execution of this Agreement. The construction of the Water and Sewer Project shall be conducted in accordance with the standards of the Howard County Design Manual unless otherwise specified on the Approved Plans and Specifications.

4.2. Pursuant to the Howard County Code and the terms of this Agreement, Developer has delivered to the County and shall maintain throughout the term of this Agreement, a performance letter of credit in the amount of seven hundred twenty-three thousand three dollars (\$723,003.00), which is equal to 100% of the estimated cost to complete the construction of the Water and Sewer Project and which guarantees the timely and satisfactory completion of the Water and Sewer Project under the terms and provisions of this Agreement (the "Performance Surety"). The Performance Surety shall be kept on file in DPW's Real Estate Services Division and is incorporated herein by this reference. Pursuant to the Howard County Code, the Developer has delivered to the County and shall maintain throughout the term of this Agreement, a labor and material letter of credit in the amount of three hundred sixty-one thousand five hundred two dollars (\$361,502.00), which is equal to 50% of the estimated cost of construction of the Water and Sewer Project and which guarantees the payment of debts owed to persons for the provision of labor and materials used in the construction of the Water and Sewer Project required under the terms and provisions of this Agreement, which shall remain in effect one year after the date of final acceptance of the Water and Sewer Project (the "Payment Surety"). The Payment Surety is kept on file in DPW's Real Estate Services Division and is incorporated herein by this reference.

4.3. It is understood and agreed that the Developer is responsible for all land development operations. The Developer may construct other required improvements in conjunction with the construction of the Water and Sewer Project, provided, however, that all work is performed and completed in accordance with the appropriate standards, plans and specifications. The Developer shall be required to repair damage to any County facilities and improvements at its own expense if, as a result of grading or construction activities, these facilities have been damaged by the Developer, the builder, contractor, subcontractors, material suppliers or any other agents of the Developer. If in the judgment of the County the damage presents an imminent threat to the public health, safety or welfare, the Developer shall repair the damage immediately upon the request of the County. If the Developer fails to make such repair, the County shall have the right to enter the Property, repair the damage, and recover the cost of the repair from the Developer, including but not limited to court costs, attorneys' fees and direct administrative and overhead costs or to pursue a default under Section 13.

5. Easements and Fee Simple Grants. The Developer shall execute and deliver to the
Office of Law
February 2005

County, a deed for the conveyance of the portion(s) of the Property containing the Water and Sewer Public Improvements and dedicated to the County on the Subdivision Plat. The County hereby grants the Developer and its contractors the right to enter such portions of the Property during the term of this Agreement for the purpose of constructing the Water and Sewer Project in accordance with this Agreement.

6. Indemnification. The Developer covenants to indemnify and save the County harmless from and against any and all claims, actions, damages, liability and expense of any nature, including reasonable attorneys' fees and the County's costs of defense, in connection with loss of life, personal injury and/or damage to or loss of property that arises from the construction of the Water and Sewer Project and other work or activity of the Developer and its respective agents, servants, employees, contractors and subcontractors in, on or about, or impacting on, the Property or any rights-of-way, easements, open space land, park land or other property dedicated, leased or licensed to, owned or occupied by the County and related to the Water and Sewer Project.

7. Commencement of Construction. Developer agrees that the construction of the Water and Sewer Project covered by this Agreement shall not begin until the DPW, Bureau of Engineering; Construction Inspection Division ("CID") shall issue a notice to proceed. The Developer shall notify CID of the proposed starting date and arrange for the required inspection services set forth in Section 8 with CID prior to the issuance of the notice to proceed letter. The Developer shall request the County's approval of any proposed red line revision, change to, or deviation from the Approved Plans and Specifications. Developer shall not proceed with any construction that is not on the Approved Plans and Specifications as amended by any County approved field change or red line revision from time to time. Developer shall promptly process an approved field change to a red line revision.

8. Inspection. CID shall conduct periodic inspections during the construction of the Water and Sewer Project to ensure that construction is performed in accordance with the Approved Plans and Specifications and the Howard County Design Manual. The Developer and its respective agents and employees, shall cooperate with the County in the conduct of such inspections. The County agrees to advise Developer of any deficiencies noted during the inspections. The Developer shall promptly take the necessary actions to correct the noted deficiencies. The County may issue a stop work order on the construction of the Water and Sewer Project if the County determines that there are major deficiencies in the construction of the Water and Sewer Project.

9. Connection to Public Facilities Prior to Final Acceptance.

9.1. Prior to the final approval and acceptance of the Water and Sewer Public Improvements as provided in Section 10, below, connections to the public water and sewer facilities shall be allowed if the following conditions have been met:

9.1.1. Developer shall have completed the Water and Sewer Project and CID shall have conducted its In-Service Inspection and approved the construction of the Water and Sewer Project.

9.1.2. The DPW shall have released the Water and Sewer Public Improvements for service.

9.1.3. Developer shall have provided to the CID a notarized affidavit which certifies that their respective subcontractors and materials' suppliers have been paid in full for all work satisfactorily completed and materials furnished as of the time of the In-Service Inspection.

9.1.4. Developer shall have provided to the DPW's project manager for the Water and Sewer Project, a copy of the invoices received from the Developer's contractors documenting the actual costs of the construction of the Water and Sewer Project through the date of the In-Service Inspection.

9.1.5. Developer shall have removed all equipment, debris, construction material, landscaping material, and trash from any County property used by the Developer for the Water and Sewer Project.

9.2. At all times prior to final acceptance of the Water and Sewer Project, the Developer is responsible for all costs associated with making final utility adjustments and protecting and repairing the Water and Sewer Project.

10. Final Approval, Dedication and Acceptance.

10.1. The County agrees that upon final completion of the Water and Sewer Project in accordance with the Approved Plans and Specifications, the Water and Sewer Public Improvements shall be officially accepted into the County's system of publicly operated and maintained facilities provided that the following requirements have been met:

10.1.1. The County shall have received a Maintenance and Repair Surety executed by Developer in accordance with Section 11, below;

10.1.2. Developer shall have provided to CID a notarized affidavit which certifies that their respective contractors, subcontractors and materials suppliers have been paid in full for all work satisfactorily completed and materials furnished with respect to the Water and Sewer Project at the time of the Final Inspection;

10.1.3. The County shall have received a notarized waiver of lien executed by each contractor, subcontractor and material's supplier;

10.1.4. The County shall have inspected the Water and Sewer Project.

10.1.5. The Developer's Engineers shall prepare and certify the as-built drawings for the Water and Sewer Project specifying the vertical and horizontal elevations for all of the improvements associated with the Water and Sewer Project and deliver the same to the County.

10.1.6. Developer shall have reimbursed the County for all costs associated with repairs undertaken by the County pursuant to Section 3 of this Agreement; and

10.1.7. Developer shall have provided to the DPW's project manager for the Water and Sewer Project, a certification of the actual costs of the Water and Sewer Project and a copy of the invoices received from the Developer's contractors documenting the actual construction costs of the Water and Sewer Project.

10.2. Official acceptance of the Water and Sewer Project shall be deemed to occur when the County executes the Final Inspection for Water and Sewer Acceptance form. Upon the acceptance of the Water and Sewer Public Improvements under this Agreement and the posting of the Maintenance and Repair Surety required under Section 11, below, the Developer shall be released from any further obligations under the Performance Surety. Further, the Developer shall be released by the County from any further obligations under this Agreement, except that such release shall not affect: (1) the Developer's obligations under Section 11, below; and (2) the Developer's obligations with respect to the Payment Surety as provided in Section 4 of this Agreement. Developer agrees that upon official acceptance by the County, title to the Water and Sewer Public Improvements under this Agreement shall be and remain forever in Howard County, Maryland.

11. Warranty, Maintenance and Repair Surety.

11.1. Developer warrants to the County that the completed Water and Sewer Project: (a) shall be constructed and installed in accordance with the Approved Plans and Specifications; and (b) shall be free from any defects in materials and/or workmanship.

11.2. If, following acceptance of the Public Improvements by the County, any portion of the Project or the work covered by this Agreement is defective in materials and/or workmanship or is damaged as a result of the Developer's or Developer's affiliate's activities in completing the public improvements serving the adjacent properties within the Service Area, or is otherwise not in conformity with the Approved Plans and

Specifications, the Developer shall promptly and faithfully repair and correct such damage, non conformities or defects.

11.3. Developer further agrees to furnish and maintain until released by the County, an irrevocable maintenance and repair surety in a form acceptable to the County (the "Maintenance and Repair Surety") guarantying its obligation to complete and repair and correct any damage, defects in materials and/or workmanship, or non-conformities with the Water and Sewer Public Improvements as provided above. The Maintenance and Repair Surety shall be in an amount equal to ten percent (10%) of the original amount of the Performance Surety. The Developer's obligation under the Maintenance and Repair Surety shall remain in full force and effect: (a) for a period of one (1) year from the official date of acceptance of the Water and Sewer Public Improvements, or (b) until such time as all damage, defects, and non-conformities identified within the aforesaid one-year period have been satisfactorily corrected and repaired, whichever of (a) and (b) is later, at which time the Developer shall be officially released from any further obligations under the Maintenance and Repair Surety.

12. Fire Hydrants. Fire hydrants shall meet the specifications of and shall be approved by the County prior to installation by the Developer.

13. Defaults and Remedies.

13.1. Developer shall be deemed to be in default under the terms and provisions of this Agreement under the following conditions:

13.1.1. Developer fails to construct the Water and Sewer Project in a timely manner; or

13.1.2. Developer fails to construct the Water and Sewer Project in accordance with the Approved Plans and Specifications; or

13.1.3. Developer fails to take appropriate action within thirty (30) days after written notification by the DPW of unsatisfactory progress in constructing the required Project; and thereafter Developer fails to maintain satisfactory progress in construction of said improvements; or

13.1.4. Developer fails to commence appropriate and effective corrective action within thirty (30) days after written notification by the County of the noncompliance with specified engineering requirements during the construction of the Project; and thereafter Developer fails to diligently pursue and complete such corrective action; or

13.1.5. Developer fails to commence appropriate and effective corrective action within fifteen (15) days after written notification by the County under Section 4 hereof to repair damage to County property.

13.2. In the event of any default by Developer in its performance of this Agreement, the County shall have the right to enforce this Agreement, as provided by law, shall give Developer and the bonding company issuing the Performance Surety written notice of said default, requiring the company to elect, in writing and within thirty (30) days, one of the following:

(a) complete the Water and Sewer Project in accordance with the Approved Plans and Specifications by the date determined by the County; or

(b) indemnify the County for the costs, request the County to complete the Water and Sewer Project, and pay to the County within thirty (30) days after the County's demand therefore, the full costs incurred by the County to complete the Water and Sewer Project including but not limited to, the costs of constructing, engineering and inspecting the Water and Sewer Project and the associated overhead and administrative costs.

13.2.1. The right to enter upon the Property to construct or complete the Water and Sewer Project;

13.2.2. The right to withhold or suspend building permits, temporary use and occupancy permits and/or final use and occupancy permits for structures within the Property until such time as the default on the Water and Sewer Project has been cured;

13.2.3. The right to recover from the Developer all such additional costs as may be incurred by the County in order to complete the Water and Sewer Project in accordance with the Approved Plans and Specifications.

14. Cost Sharing of Water and Sewer Project.

The County and the Developer agree that the County will share a portion of the actual construction costs of the Water and Sewer Project which are approved by DPW, excluding the costs of rights-of-way acquisition, the costs associated with fire hydrants and the engineering and inspection costs in an amount not to exceed seven hundred twenty-three thousand three dollars (\$723,003.00),

14.1 The funds collected for water and sewer in-aid-of-construction charges associated with the water and sewer demands of the Property during a period of five (5) years commencing on the date of this Agreement shall be the sole source of funds for any cost sharing by the County.

14.2 In accordance with Sections 8.1.4 and 9.1.7, the Developer shall submit copies of the Developer's contractors' invoices for the Water and Sewer Project to evidence the actual costs of constructing the Water and Sewer Project. The total amount of money remitted to the Developer shall not exceed the actual construction costs of the Water and Sewer Project.

15. General Provisions.

15.1. Developer agrees to waive all rights of appeal as to the issue of the necessity and requirement for construction or maintenance of the Water and Sewer Project shown and described on the Approved Plans and Specifications.

15.2. The issuance of building permits pursuant to this Agreement is subject to possible interruption or suspension by reason of State and Federal action, such as a moratorium imposed for environmental or health reasons, and the time within which the Water and Sewer Project is to be constructed hereunder shall be extended by the length of any such interruption, suspension or moratorium.

15.3. The parties acknowledge that public water and/or sewer capacity to be created by expansion of current facilities, or construction of new facilities, is contingent on the availability of State and Federal funds for Water and Sewer Capital Programs. The parties agree that the County shall not have any liability or any responsibility to provide allocations due to the inability of the County to obtain necessary Federal or State funds or to acquire, in a reasonable time, easements necessary for construction of water and/or sewer projects or for Federal or State action, including operational moratoria, which may suspend, delay or otherwise affect the allocation. It is understood that an allocation of capacity is not assignable or transferable from one development or section of a development to another except as provided in Section 18.122B of the Howard County Code. It is also understood that water and/or sewer capacity allocated to an applicant shall be reserved only as provided under Section 18.122B of the Howard County Code. The Developer hereby acknowledges that the conditions imposed in this Section are established by Section 18.122B of the Howard County Code.

15.4. In the event Developer is delayed or prevented from commencing or completing construction of the Project provided by this Agreement within the period hereinabove specified by reason of war, riot, insurrection, strikes, epidemics, earthquakes, tornadoes, floods, explosions, governmental restraints, restrictions or limitations, or the unavailability of materials due to strikes or for any other reasonable delays (hereinafter collectively referred to as "Force Majeure"), the performance required of Developer shall be excused for as long as such event of Force Majeure shall continue and the period of time specified herein for performance by the Developer shall be automatically extended by the number of days during which performance was precluded by the continuance of such event of Force Majeure.

15.5. No Certificate of Occupancy for any improvements within the property shown and described on the Approved Plans and Specifications shall be issued without the prior approval by the DPW of the adequacy of access, drainage and other essential public improvements pertinent to the property being certified, and compliance with all other applicable requirements of the building code.

15.6. Nothing herein shall be construed as relieving Developer from the payment of all meter setting charges, water and/or sewer charges, front foot benefit assessment, in-aid-of-construction assessment, ad valorem taxes, supplemental in-aid-of-construction assessments (where applicable) and/or supplemental ad valorem taxes (where applicable), nor shall Developer be entitled to any set off on this account.

15.7. Any assignment or pledge of this Agreement must be assented to, in writing, by the County prior to such assignment or pledge; otherwise, said assignment or pledge shall be invalid.

15.8. All correspondence regarding this Agreement and the work to be performed hereunder shall be mailed or personally delivered as follows: to the Developer at 9090 Whiskey Bottom Road, Laurel, Maryland 20723 and 5929 College Avenue, Attn.: General Counsel, Oakland, CA 94618; and to the County, the Director of Public Works, George Howard Building, 3430 Court House Drive, Ellicott City, Maryland 21043. Either party to this Agreement may change its address by written notice to the other party.

15.9. Each writing or plat referred to in this Agreement as an exhibit is hereby made a part of this Agreement.

15.10. Any amendment to this Agreement must be in writing and signed by the Developer and the County.

15.11. This Agreement was made and entered into in Maryland and is to be construed under the Laws of Maryland. As to the Developer, this Agreement is intended to be a contract under seal and a specialty.

IN WITNESS WHEREOF, the parties have caused their duly authorized officer to execute this Agreement under their respective seals as of the day and year first above written.

ATTEST:

EDY'S GRAND ICE CREAM

_____, Corporate Secretary

By: _____(SEAL)
_____, President

ATTEST:

HOWARD COUNTY, MARYLAND

Raquel Sanudo
Chief Administrative Officer

By: _____(SEAL)
James N. Robey
County Executive

APPROVED: DEPARTMENT OF PUBLIC WORKS

James M. Irvin, Director

APPROVED FOR SUFFICIENCY OF FUNDS:

Sharon F. Greisz, Director
Department of Finance

APPROVED AS TO FORM AND LEGAL
SUFFICIENCY this ____ day of _____, 2005

Barbara M. Cook
County Solicitor